

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Rules to Provide Channel
Exclusivity to Qualified
Private Paging Systems
at 929-930 MHz

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PR Docket No. 93-35

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY COMMENTS

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Summary Of The Filing

Metromedia Paging Services, Inc. (MPS) replies specifically to the initial comments filed by Metagram America, Inc. (Metagram) and by MAP Mobile Communications, Inc. (MAP).

MPS demonstrates that Metagram abused the Commission's processes, violating Rule Section 1.44(a) by combining requests which are to acted upon by different units of the agency.

Metagram has no legitimate interest in this proceeding, having assigned its licenses and transferred control of its system to MAP.

If the Commission is ever to be able to grant exclusive authorizations, it must do so immediately upon adoption of its proposed rule amendments. The Commission should not afford any more time to an entity which has had ten years of de facto exclusivity but which failed to meet the exclusivity criteria. If any licensee is qualified upon adoption of the exclusivity rules, that licensee should be awarded exclusive use of the channel and all other operators should be assigned grandfathered status.

To prevent small operators from frustrating exclusivity, the Commission should recognize a hierarchy of eligibility categories, namely, nationwide, regional, and local, and should provide true exclusivity to a licensee making the highest and best use of the spectrum. A nationwide licensee should have true exclusivity over all co-channel regional and local stations, and a regional system should have exclusivity over all local stations. Failing to preserve the highest and best use of the spectrum would allow small local operators to obstruct licensees having exclusivity over a larger area and to demand payoffs to permit the large operator to make full use of its exclusive authorization.

The Commission should follow decades of precedent and permit a grandfathered system to continue to operate, but not to obtain new stations on the channel or to expand its service area.

The holder of an exclusive authorization should not be barred from operating or obtaining licenses for stations on other channels. When a licensee needs an additional channel, it should be able to obtain one.

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REPLY COMMENTS

Metromedia Paging Services, Inc. (MPS), by its attorneys, hereby files Reply Comments in the above captioned matter. In support of its position, MPS shows the following.

MPS will limit its Reply Comments to the initial comments of Metagram America, Inc. (Metagram) and of MAP Mobile Communications, Inc. (MAP). MPS did not participate in this proceeding by filing initial comments, but is a member of NABER and generally supports NABER's comments. However, presented with the Metagram/MAP comments, MPS has been compelled to defend itself and to take issue with the Metagram/MAP position.

Metagram Abused The Commission's Processes

A rule making proceeding is an inappropriate forum for attempting to influence a pending adjudication. Nevertheless, in the guise of suggesting revisions to the Commission's proposed rule amendments which would favor Metagram/MAP, Metagram spent approximately half its comments taking yet one more brass-plated opportunity to express itself concerning pending applications filed by MPS for use of 929.9875 MHz, the same multi-area channel used by

Metagram/MAP. Metagram vociferously opposed MPS's applications and has abused the Commission's processes by dragging its licensing controversy with MPS into the instant rule making proceeding.

Section 1.44(a) of the Commission's Rules prohibits the combination of requests requiring action by the Commission with requests for action by persons acting pursuant to delegated authority. The instant rule making proceeding requires action by the Commission. MPS's applications are being considered pursuant to authority delegated to the Private Radio Bureau. Because Metagram's comments violate Rule Section 1.44(a), they should be stricken from the record in the instant matter, disregarded totally, and returned to Metagram to avoid their contaminating either proceeding.

Metagram's Interest Is Illegitimate

Metagram has no legitimate interest to pursue in the instant proceeding. Metagram has executed FCC Form 1046 assignment of authorization statements to MAP Paging Co., Inc. for all of its existing stations and, as of April 1, 1993, turned its entire system over to MAP.¹ Since Metagram has taken itself out of the business, having leased all of its facilities and turned over

¹ MPS has filed a Petition For An Order To Show Cause demonstrating that Metagram and MAP have engaged in an unauthorized transfer of control of the paging system which is authorized to Metagram. MPS has requested the issuance of an order to Metagram to show why Metagram's licenses should not be revoked and has requested that the Commission determine that MAP is not qualified to be a Commission licensee. MPS respectfully directs the Commission's attention to that Petition to assist in its appreciation of Metagram's lack of any substantial interest in the instant proceeding.

control of the system to MAP prior to action by the Commission on MAP's applications for assignment, MAP's primary interest in filing comments in the instant proceeding appears to have been to give it one more chance to attack MPS, if motivated by nothing more than pique.

Although Metagram has walked away from its old paging system, its comments indicate that Metagram may still be interested in seizing a future ability to traffic in PCP system, desiring new opportunities to "sell its system as capable of meeting the needs of customers now and in the future," Metagram comments at 21. Since Metagram has handed over its entire old paging system to MAP, to the extent that Metagram has any cognizable interest in this proceeding, it must be in seeking future opportunities to traffic in PCP systems. The Commission should take care that the rules which it adopts in this proceeding do not encourage the trafficking opportunities of which Metagram spoke so highly.

Exclusivity - Now, If Ever

At paragraph 18 of its Notice of Proposed Rule Making in this proceeding, the Commission stated that it "believe[d] that exclusivity should be implemented sooner, rather than later. The purpose of granting exclusive channel rights is to prevent congestion before it occurs." Despite this bedrock basis for the Commission's proposed action, MAP and Metagram would have the Commission grant exclusivity sometime later, at their particular convenience.

Metagram is in the poorest position of any participant in this Docket to bring forward its idea of an "Achievement Period" within which MAP might have an unearned opportunity to

make up for Metagram's strictly junior achievement and prevent any other entity from obtaining truly exclusive use of 929.9875 MHz nationwide. Metagram had a ten year head start, having obtained its initial licenses on the channel in 1982 and 1983,² having been free from sharing the channel with anyone for all that time, and still having failed not only to meet the criteria which the Commission has proposed to require for exclusivity, but also having failed to meet its own goals and having failed to disclose its failure when required to do so by the Commission's Rules. Accordingly, Metagram's suggestions must be taken with a carload of salt.

Metagram has already enjoyed a ten year achievement period, during which it had de facto exclusive use of a multi-area channel across the entire nation. Metagram has represented that it had some 30,000 paging units in service two years ago, but that its customer base had dwindled to 17,000 by the end of 1992. Even disregarding that Metagram never requested authorization for more than 5,000 pagers, with a self-proclaimed 17,000 pagers in service in "36 markets nationwide",³ Metagram comments p. 2, Metagram has an average of fewer than 500

² It is impossible to ascertain from Metagram's statement that it "embarked on an ambitious program to construct and operate a nationwide alpha-numeric paging system on 929.9875 MHz . . . in 1987, 1988, and 1989," whether Metagram lacked ambition for the first five years that it held licenses on the channel, or whether Metagram was hoping that the Commission would not recognize that it was attempting to obscure the length of head start which it has enjoyed on the channel. Metagram is similarly slippery as to the facts at pp. 2-3 of its comments in stating that Metagram's system "at this time the largest PCP system operating on a single frequency." MPS believes that careful analysis would disclose that the PCP system organized by Florida Network USA, Inc. on frequency 152.480 MHz was the largest on a single frequency at any time Metagram might have been citing.

³ It is quite impossible to ascertain what Metagram considered to be a "market". Although Metagram suggested definitions for local and for regional markets, Metagram comments at 4 n. 3, when speaking of its existing system, it appears to consider one transmitter in Arkansas, one

paggers in service in each market. Not until MAP's due diligence survey of Metagram's assets was Metagram forced to disclose that it had not constructed approximately 150 of the base stations for which it had obtained authorizations, and also had not disclosed its failings to the Commission by returning the authorizations to the Commission as required by its Rules. Having had, and blown, a golden opportunity for achievement, Metagram has had the audacity to suggest that an operator be afforded an additional period of up to three years⁴ in which to "achieve" the Commission's criteria for exclusive use of a channel.

Metagram has a most peculiar idea of how to run a horse race. See, Metagram comments at 16, where Metagram metaphorically suggested that providing exclusivity to the first licensee actually to meet the Commission's criteria would be "similar to a horse race where the horses are let out of the gate at different times." To help its plug horse which started a meandering saunter ten years ago, but which has not yet reached the third turn, Metagram would move the finish line out of view of the clubhouse, hoping that the galloping young thorobred

in Mississippi; and two each in Louisiana, Nevada and Colorado to constitute adequate service to five "markets". Metagram is similarly obscure in suggesting at pp. 3-4 of its comments that it provides service to Chicago which should afford it "local" exclusivity with only ten transmitters. The question must be, of course, local to what part of Chicago, the Loop, some of the Inner Met, a small portion of the Outer Met, or some other sector? As the operator of one of the oldest and most successful paging systems in Chicago, MPS is well qualified to state that only ten 929 MHz band transmitters cannot provide anything resembling local service entitled to exclusivity anywhere in the enormous Cook/DuPage County area which constitutes most of the geographic area of Chicagoland.

⁴ More modestly, but no more convincingly, MAP limited its suggested extension period to one year.

would run out of oats while the one with the headstart could take a late hit of Lasix and save itself from the glue pot. For Metagram, the gate opened ten years ago. MPS is still held at the post. NABER's petition for rule making weighed in for Metagram, for MPS, and for all of the other contenders at the same time. When it released its NPRM, the Commission sounded the trumpet and held out the carrot of exclusivity for everyone at the same time. The proposed rule amendments should become effective at the traditional sounding of the starter's gun, and the finish line should be at the traditional location for a major race, namely, at the starting line. At the risk of beating a dead horse, if the Commission had any nagging doubt, MPS must say that Metagram's idea just can't pass the saliva test.⁵

In suggesting that the Commission should provide an existing licensee additional time within which to achieve exclusivity, Metagram would take for itself what it so aggressively told the Commission should be denied to MPS, namely, an extended construction period. In its initial assault on MPS's request for an extended period within which to construct its proposed system, Metagram stated that "licenses should be given to those who can make efficient use of scarce spectrum in the near term, not to those who believe that the 'premature' construction of facilities would cause it to 'waste substantial funds'," Metagram Petition to Deny and Opposition to Waiver Request at 25 (November 25, 1992). Metagram plunged onward to state that "the Commission has established no long-term construction exception for the shared PCP channels,

⁵ Metagram should be thankful that the Commission provided a grandfather provision so that a plow horse could enjoy its later life out in the pasture, rather than meeting the traditional, sudden termination of a lame thorobred's career.

for the obvious reason that extended construction schedules permit applicants to warehouse the frequency and obstruct other applicants for shared frequencies," Metagram Reply to Opposition at 22 (December 30, 1992). And, Metagram opined that extended construction periods "encourage warehousing, discourage future frequency coordination, and tend to lessen competition. The present construction deadlines protect substantial public interest concerns, and should be enforced," id. at 18. Now that the horseshoe is on the other hoof, Metagram has abandoned the position which it took against MPS and wants more time to saddle up and ride hellbent for leather for the borderline. For all the reasons that it posted against MPS, Metagram should be estopped from demanding for itself any extra time within which to meet the exclusivity criteria.

While MPS's critique of Metagram as proponent of an additional period within which MAP might meet the exclusivity criteria could be misconstrued as merely an ad hominem thrust, MPS will demonstrate herein the flaws inherent in the Metagram/MAP plan, which would be clear even if one were to disregard the source from which the plan arose. The Commission's focus must be on the merits or demerits of the Metagram/MAP proposal, but the public deserves for the Commission to consider whose pony the Metagram/MAP plan is intended to gore, and whose it is designed to shelter.

There two primary reasons for granting exclusivity to those systems which are qualified immediately upon release of the Commission's Order in this docket and denying it to an operator whose performance was only mediocre (an operator which, for example, built only about two

thirds of the base stations for which it had obtained authorizations; which, by its own admission, is only about two-thirds of the way toward meeting the proposed criteria; and which has seen a steady decline in its customer base at a time that the paging business has been thriving everywhere in the nation). The MAP/Metagram suggestion represents nothing more or less than an effort to frustrate the Commission's express objective of granting exclusivity before it becomes too late to do so. The Commission is correct at paragraph 17 of its NPRM; if it is to succeed in granting exclusivity, it must do so at the earliest possible time, or see the opportunity rapidly waste away.

The public interest suffers when a mediocre performer is permitted to obstruct a fully successful performer. MPS believes that those who best perceive the future and who act promptly upon their perception should have the benefit of their superior skills and willingness to act to bring new service to eligible persons. If a licensee has met the exclusivity criteria proposed by the Commission, then the licensee should be afforded exclusivity immediately the Commission's Order is adopted. An operator which had a full and fair opportunity (for example, ten years of de facto nationwide exclusivity) to develop a qualifying system but failed to qualify deserves the opportunity to continue to operate and amortize the investment which it had been willing to make in its existing facilities, but nothing more. It gave nothing more to the public and deserves nothing more in return.

Metagram asserted at p. 18 of its comments that there was no basis "for awarding exclusivity immediately upon adoption of this NPRM [sic] to one class of licensees without giving [more time to] existing licensees who, like Metagram, may be 80% of the way toward national exclusivity." (emphasis in original) However, in its own statement Metagram

~~its statement provided the basis for providing immediate exclusivity to a different operator~~

a smaller operator from frustrating a larger category of exclusivity. The Commission should adopt rules which protect the highest and best use of a channel by providing sole exclusivity to the system which is highest among the categories of nationwide, regional, and local. The Commission should provide that an entity qualifying for nationwide exclusivity holds an exclusive authorization everywhere in the nation, that all other systems on the channel are grandfathered, and that no applications for new stations by any other applicant will be accepted. Similarly, an exclusive authorization for a regional system should provide exclusivity over the entire region and all local systems should become grandfathered upon grant of an exclusive regional authorization.

Failure to protect the highest and best use of a channel would have the meretricious consequence that a local operator who had sufficient transmitters to qualify for local exclusivity in, for example, Boston, would be able to prevent an operator who had been granted nominal nationwide exclusivity from, in fact, providing service to the sixth largest market.⁹ To encourage and facilitate the development of systems which will meet the needs of an ever increasingly mobile population and to prevent small operators from holding large systems hostage and demanding ransom for access to certain markets, the Commission should provide that grant of exclusivity for a nationwide system overrides any regional or local exclusivity and that grant of regional exclusivity overrides all local exclusivity.

⁹ This is concern which Metagram/MAP should have since Metagram is open in Boston.

There Is No Advantage

The "unfair advantage" which Metagram suggests the proposed rules would give to new applicants over existing operators is entirely fanciful. There would be no advantage to either an existing or a new operator from the proposed rule amendments. Nothing in the Commission's Rules appears to have barred either Metagram or MAP from filing applications for any number of additional transmitters which they intend to place in operation within eight months of the date of grant. Therefore, the only reasonable conclusions are that Metagram has no intention of adding to a system which it has already sold and delivered to MAP, and that MAP, for whatever reasons it may have, has not been interested in expanding the system up to this time. If Metagram or MAP had any intention of meeting the Commission's goal of providing exclusivity sooner rather than later, they'd be filing applications for new stations and their comments would be wholly unnecessary. So, it is clear that the suggestion launched by Metagram/MAP was intended to serve solely the interests of - gasp - Metagram and MAP.

Grandfathering

The only reasonable grandfathering provision for a system which fails to meet the exclusivity criteria (particularly where such a system had a long head start and wasted its opportunities) should be guided by the precedents of other grandfather provisions which the Commission has adopted, see, e.g., Rule Section 90.53(c)(3), adopted some 30 years ago, which provides that "no new stations will be authorized and will extension of existing systems be

any additional stations when one licensee has met the exclusivity criteria. In contrast to decades of precedent, MAP would render a grant of exclusivity meaningless by permitting grandfathered systems which failed to qualify for exclusivity to "expand their systems into new areas," MAP comments at 6, or to claim a right to an oxymoronic "shared exclusivity," *id.* at 7.

Speculation Is Not An Issue

file applications for new stations, and, perhaps, achieve exclusivity itself after failure of the speculator. In either case, Metagram/MAP would have had and would continue to have a full and fair opportunity to achieve the exclusivity criteria.

There Is No Channel Sharing Issue In This Proceeding

Metagram's suggestion that an operator obtaining exclusivity would be able to dictate the terms of channel sharing to grandfathered operators was without foundation. The Commission has not proposed to change Rule Sections 90.173(b) and 90.403(e), which place on each and every licensee the duty to cooperate with other licensees and take reasonable precautions to avoid causing harmful interference. Therefore, an operator holding an exclusivity authorization will still

Additional Channels Should Be Permitted

Metagram has repeatedly alleged that the combination of Metagram/MAP and MPS on

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

to inquire of Metagram why Metagram is trying not only to stymie MAP's growth but to destroy its existing systems.

Miscellaneous

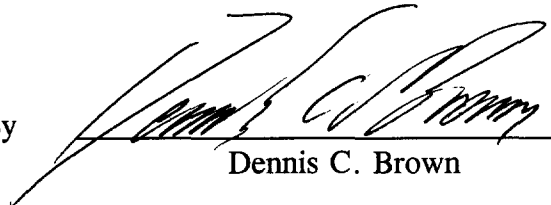
Metagram is in error at footnote one of its comments in stating that MPS has proposed to transfer to a new licensee the paging system which MPS has proposed for operation on 929.9875 MHz. Although applications have been filed for consent to transfer control of MPS to a new entity with respect to authorizations currently held by MPS, but MPS has not, and cannot, file applications for transfer of stations for which it has not yet obtained authorizations.

Conclusion

For all the foregoing reasons, MPS respectfully requests that the Commission strike the comments of Metagram as violative of the Commission's Rules of Practice and Procedure, and that the Commission adopt rule amendments in this proceeding substantially in accord with MPS's suggestions contained herein.

Respectfully submitted,
METROMEDIA PAGING SERVICES, INC.

By

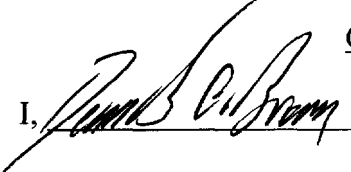


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I, , do hereby certify on this 20th day of May, 1993, that I have caused a copy of the foregoing Comments to be served, via United States mail, postage prepaid to each of the following persons.

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